Supreme Court, U.S.
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No. 96100896

In The

Supreme Court

of the United States

October Term 1996

JEFFERSON COUNTY, ALABAMA,
Petitioner,

v.

WILLIAM M. ACKER, JR. AND U.W. CLEMON, JUDGES, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

BRIEF OF JUDGES ACKER AND CLEMENS IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondent Judges Acker and Clemon do not accept the statement of Questions Presented For Review in the Petition for Certiorari. Instead, the questions presented are these:

1. Whether Jefferson County's privilege/occupational tax (Ordinance 1120 enacted under Alabama Act 406 of 1967) levied upon "gross receipts" -- defined in the Ordinance as the gross amount a person is entitled to receive (whether received or not) as a result of work performed in the County -- of an Article III judge attributable to the judge's functions performed within the County is a tax on income, pay or compensation under the Public Salary Act?

2. Whether Jefferson County's privilege/occupational tax (Ordinance 1120 enacted under Alabama Act 406 of 1967) levied upon "gross receipts" -- defined in the Ordinance as the gross amount a person is entitled to receive (whether received or not) as a result of work performed in the County -- of an Article III judge attributable to the judge's functions performed within the County is a tax on income, pay or gross receipts under the Buck Act?

3. Whether Jefferson County's privilege/occupational tax (Ordinance 1120 enacted under Alabama Act 406 of 1967) levied upon "gross receipts" -- defined in the Ordinance as the gross amount a person is entitled to receive (whether received or not) as a result of work performed in the County -- of an Article III judge attributable to the

judge's functions performed within the County is levied upon the judge's functions while an instrumentality of the federal government, as opposed to levy upon the receipt of funds?

4. Whether Jefferson County's privilege/occupational tax (Ordinance 1120 enacted under Alabama Act 406 of 1967) levied upon "gross receipts" -- defined in the Ordinance as the gross amount a person is entitled to receive (whether received or not) as a result of work performed in the County -- of an Article III judge attributable to the judge's functions performed within the County is a direct tax on the performance of the functioning of the judicial branch of the federal government in violation of the intergovernmental tax immunity doctrine?

PARTIES TO THE PROCEEDINGS BELOW AND CERTIFICATE OF INTERESTED PERSONS

Petitioner

Jefferson County, Alabama.

Petitioner's Counsel in this Court

Edwin A. Strickland
Jeffrey M. Sewell

Petitioner's Additional Counsel in the Court below

Carlos Heaps
Allen Ramsey
Charles S. Wagner

Respondents

Hon. William M. Acker, Jr.
Hon. U. W. Clemon

Respondents' Counsel

Irwin W. Stolz, Jr.
Seaton D. Purdom

Amici Curiae (Allowed by 11th Circuit Court of Appeals)

Hon. James H. Hancock
Hon. Robert B. Probst
Hon. Sharon Lovelace Blackburn
Hon. Edwin L. Nelson

Amici Curiae (Not Allowed by 11th Circuit Court of Appeals)

Kevin M. Forde
Richard J. Pendergrast,
counsel for Federal Judges Association

Trial Judge

Hon. Charles A. Moye, Jr.,
United States District Judge,
NDGA

En Banc Eleventh Circuit Court of Appeals

Hon. Gerald Bard Tjoflat
Hon. Phyllis A. Kravitch
Hon. Joseph W. Hatchett
Hon. R. Lanier Anderson, III
Hon. J. L. Edmondson
Hon. Emmett R. Cox
Hon. Stanley F. Birch, Jr.
Hon. Joel F. Dubina
Hon. Susan H. Black
Hon. Ed Carnes
Hon. Rosemary Barkett
Hon. Albert J. Henderson

Exemplar District Court Judge, sitting in a transferred case, referenced in the 11th Circuit En Banc Opinion

Hon. Orinda D. Evans

Class of District Court and Circuit Court Judges

Each United States Judge who has within the last five years performed or who in the future may perform any work or duties relating to the judicial function at any office or other location within Jefferson County in Alabama, even if the work is performed while sojourning there while in transit, who are subjected to the employee reporting requirement of Jefferson County, Alabama Ordinance 1120.

No other persons are known to have participated directly or indirectly in the appeal of this matter, or to otherwise qualify as interested persons.

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CITATIONS OF THE OPINIONS AND JUDGMENTS ENTERED IN THE COURTS BELOW

The 11th Circuit En Banc Opinion (*Jefferson County, Alabama, v. Acker*, 92 F.3d 1561 (11th Cir. 1996)) is annexed to the Appendix to the Petition for Certiorari in this Case. The District Court Opinion (*Jefferson County, Alabama, v. Acker*, 850 F. Supp. 1536 (N.D. Ala. 1994)) has been filed by the Petitioner as a Supplemental Appendix.

The En Banc Order, *Jefferson County, Alabama v. Acker*, 73 F.3d 1066 (11th Cir. 1996), granting rehearing en banc is annexed within the Appendix hereto, and expressly vacates the prior panel Opinion (*Jefferson County, Alabama v. Acker*, 61 F.3d 848 (11th Cir. 1995), upon which the Petition in part relies. The prior vacated Opinion appears in neither party's Appendix.

RESPONSE OF ACKER AND CLEMON TO PETITIONER'S STATEMENT FOR BASIS OF JURISDICTION

The Petition contends that this Court has jurisdiction pursuant to 28 U.S.C. § 1254. The Petition follows an En Banc decision of the United States Court of Appeals for the Eleventh Circuit, but confusingly combines parts of holdings from the District Court Opinion with the En Banc Opinion.

(i) En Banc Opinion and Judgment was filed August 30, 1996.

(ii) No application for rehearing was thereafter filed.

(iii) No cross petition is filed.

(iv) The Petition contends that jurisdiction is conferred by 28 U.S.C. § 1254(l) and Rule 10(c) of the Rules of the United States Supreme Court. The Petition states:

> The judgment below effectively declared the Buck Act, 4 U.S.C. §§ 106-110 and the Public Salary Act, 4 U.S.C. § 111 to be unconstitutional as applied to Article III judges. Neither the United States, nor any federal department, office agency, officer or employee is a party to this case. The United States Court of Appeals did not certify to the Attorney General the fact that the constitutionality of these acts of Congress were drawn into question. Accordingly, this petition was served on the Solicitor General of the United States, Room 5614, Department of justice, 10th Street and Constitution Avenue, N.W., Washington, D.C. 20530.

A review of the En Banc Opinion shows that nowhere has the Buck Act or the Public Salary Act been held unconstitutional, facially or as applied. Accordingly, the only pleaded basis for Supreme Court jurisdiction is lacking.

STATEMENT OF CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED IN THE CASE

The provisions involved are lengthy. Accordingly, only their citations are provided in the text of the Response of Judges Acker and Clemon. The verbatim text of the following is contained in the appendix to the Petition:

i. August 30, 1996 En Banc Opinion of the United States Court of Appeals for the Eleventh Circuit (Case No. 94-9600) -- *Jefferson County, Alabama, v. Acker*, 92 F.3d 1561 (11th Cir. 1996);

ii. The Supremacy Clause, Article VI, United States Constitution;

iii. The Buck Act, 4 U.S.C. §§ 106-110;

iv. The Public Salary Act, 4 U.S.C. § 111;

v. 5 U.S.C. § 5520;

vi. 31 CFR § 215.2.

vii. Alabama Act 406 (1967);

viii. Jefferson County, Alabama Ordinance No. 1120 (1987); and,

ix. The Alabama State Business License Code, §§ 40-12-1, *et seq.*, Alabama Code (1975).

The following appears as the Supplemental Appendix filed by the Petitioner:

x. March 31, 1994 Opinion and direction for entry of Final Judgment by the Honorable Charles A. Moye, Jr., Judge (sitting by designation), Northern District of Alabama (Case Nos. CV93-M-69-S and

CV93-M-196-S) -- *Jefferson County, Alabama, v. Acker*, 850 F. Supp. 1536 (N.D. Ala. 1994).

The following appear in the Appendix to this Response:

ix. August 30, 1996 En Banc Order of the United States Court of Appeals for the Eleventh Circuit (Case No. 94-9600) -- *Jefferson County, Alabama v. Acker*, 73 F.3d 1066 (11th Cir. 1996), granting rehearing en banc and vacating prior August 21, 1995 Panel Opinion;

x. Alabama Const., Art. 4, § 105;

xi. Alabama Const., Amend. No. 25;

xii. United States Constitution, Article III, Section I;

xiii. 28 U.S.C. § 132;

xiv. 28 U.S.C. § 1404(a); and,

xv. Fed.R.Crim.Proc. 21(a), 18 U.S.C.

The Prior Panel Opinion -- *Jefferson County, Alabama v. Acker*, 61 F.3d 848 (11th Cir. 1995), *vacated* 73 F.3d 1066 -- need not appear in the parties' appendices.

STATEMENT OF THE CASE

Respondent Judges Acker and Clemon cannot accept the statement of the case submitted by the petitioner. Especially, respondents cannot accept the repeated unsupported assertion in the Petition that the case arrives here with an "undisputed fact" that the Jefferson County tax at issue is levied upon gross receipts, pay or income. The En Banc Opinion of the United States Court of Appeals for the Eleventh Circuit in this case simply does not so hold. It holds

just the opposite. *Jefferson County, Alabama, v. Acker*, 92 F.3d 1561, 1570 [7] (11th Cir. 1996). The following is submitted as a more accurate statement of the case.

A. Statement Of Proceedings And Disposition Of The Case

In December 1992 Jefferson County, Alabama commenced separate civil actions against Defendants William M. Acker, Jr. and U. W. Clemon, United States District Court Judges for the Northern District of Alabama, Birmingham Division, in which suits Jefferson County sought to recover for alleged delinquent licensing taxes under Jefferson County Ordinance 1120. The District Court held, among other things, that the Ordinance was an unconstitutional effort to tax the performance of the judicial office, in conflict with Article III, Section I of the Constitution of the United States. *Jefferson County, Alabama, v. Acker*, 850 F. Supp. 1536 (N.D. Ala. 1994). Holding that the taxable event under the language of the statute under settled Alabama case authority was the performance of the judicial function, the trial court sustained the defendant judges' motions, ruling that the Ordinance conflicted with Article III, § I of the Constitution of the United States, a matter beyond the competence of Congress or the Executive Branch to waive. *Jefferson County v. Acker*, 850 F. Supp. 1536[5-8] (N.D. Ala. 1994). The trial court also held that the county tax presented an unconstitutional diminution of the salaries of the United States District Court judges, who had been appointed prior to the enactment of the Ordinance. *Id.*

By Opinion entered August 21, 1995, a divided panel of the United States Court of Appeals for the Eleventh Circuit reversed the Order of the trial court, holding that the tax was in essence an income tax and that the tax did not present an unconstitutional diminution of the Article III judges' compensation. *Jefferson County v. Acker*, 61 F.3d 848 (11th Cir. 1995). After timely Motion for Rehearing and Suggestion of Rehearing En Banc was filed by the defendant/appellee Article III judges, rehearing en banc was granted by Order entered January 12, 1996 and the prior divided panel Opinion was vacated. *Jefferson County, Alabama v. Acker*, 73 F.3d 1066 (11th Cir. 1996).

En Banc, the United States Court of Appeals for the Eleventh Circuit held that the Jefferson County tax was not a tax on gross receipts, income or pay, but instead was a tax levied on the performance of work itself within the County. *Jefferson County, Alabama, v. Acker*, 92 F.3d 1561, 1570 [7] (11th Cir. 1996). The Eleventh Circuit then held that the tax was a tax on the performance of the judicial function itself -- rather than upon the receipt of funds -- and was an unconstitutional tax in violation of intergovernmental tax immunity, with significant burdens sought to be imposed by the tax on the judicial function itself. *Jefferson County, Alabama, v. Acker*, 92 F.3d 1561, 1571-1573 [11-12] (11th Cir. 1996). Finally, the Eleventh Circuit held that neither the Public Salary Act nor the Buck Act purported to authorize such a tax. *Jefferson County, Alabama, v. Acker*, 92 F.3d 1561, 1571-1573 [13-14] (11th Cir. 1996).

Hence, the Eleventh Circuit En Banc Opinion differed from the District Court's Opinion in that the Eleventh Circuit En Banc Opinion did not question the constitutionality of either the Buck Act or the Public Salary Act. Instead, the En Banc Opinion held the Buck Act and the Public Salary Act to be inapplicable by reason of the structure of the tax at issue. *Id.* The Eleventh Circuit Opinion did not reach the issue of whether the Jefferson County tax brought about an unconstitutional diminution of the appellee judges compensation. *Jefferson County, Alabama, v. Acker*, 92 F.3d 1561, 1566 (11th Cir. 1996). The prior panel Opinion having been vacated, this left the District Court's Opinion in place on the issue of unconstitutional diminution of compensation.

B. Statement Of Facts

The essential material facts needed to show the correctness of the Eleventh Circuit En Banc Opinion are set forth in the En Banc Opinion itself (*Jefferson County, Alabama, v. Acker*, 92 F.3d 1561, 1566 (11th Cir. 1996)), in the District Court Opinion (*Jefferson County v. Acker*, 850 F. Supp. 1536 (N.D. Ala. 1994)), and appear without dispute in the record brought up in the prosecution of the appeal. In this, the language of the Jefferson County tax is treated as a fact. The legal conclusion as to whether it is levied on gross receipt of funds or upon the performance of work -- regardless of receipt of funds -- is a matter of law, not fact. Herein, the Petition and the Response diverge.

In 1987, the Jefferson County Commission, the governing body of the County, enacted Ordinance

1120, which imposes a privilege, license or occupational tax upon all persons engaged in any vocation, occupation, calling or profession within the County not required by state law to pay a privilege, license or occupational tax to the state. *Jefferson County v. Acker*, 850 F. Supp. 1536 (N.D. Ala. 1994); Petition Supplemental Appendix.

Jefferson County Ordinance No. 1120 provides:

> It shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession ... within [Jefferson] County on and after the 1st day of January, 1988, without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession, which license fees shall be measured by one-half percent (1/2%) of the gross receipts of each such person.

Jefferson County, Ala., Ordinance 1120, § 2; Petition App., p. 72.

> (F) The words "gross receipts" and "compensation" shall have the same meaning, and both words shall mean and include the total gross amount of all salaries, wages, commissions, bonuses or other money payment of any kind, or any other considerations having monetary value, which a person receives from or is entitled to receive from or be given credit for by his employer for any

> work done or personal services rendered in any vocation, occupation, calling or profession....

Ordinance 1120, § 1; emphasis added; Petition App., pp. 71-72. The Ordinance calls for the records to be kept by the employer or the employee to determine the compensable work done within the County and lays the tax on that work. Ordinance 1120, §§ 4-7; Petition App., p. 73-77; Ordinance 1120, §§ 1(f), 2; Petition App., p. 71-72.

These defendants were Article III judges prior to the enactment of the ordinance. *Jefferson County v. Acker,* 850 F. Supp. 1536, 1548 (N.D. Ala. 1994). The Northern District of Alabama is composed of 31 counties, including Jefferson County. *Jefferson County v. Acker*, 850 F. Supp. 1536, 1549 (N.D. Ala. 1994). Defendants routinely perform some but not all of their duties outside of Jefferson County, Alabama. *Jefferson County v. Acker*, 850 F. Supp. 1536, 1549 (N.D. Ala. 1994).

SUMMARY OF ARGUMENT

Identification of the taxable event or legal incidence of a state statute is first a question of statutory interpretation under state law. Here, the United States Court of Appeals for the Eleventh Circuit correctly drew upon Alabama precedents and upon the plain language of Jefferson County, Alabama Ordinance 1120 to determine that the taxable event of the Ordinance is the rendition of compensable services, without regard to whether compensation is actually

received. Thus, the tax under the Ordinance is imposed upon the performance of the judicial function itself. The reporting and proration requirements of the Ordinance are also brought to bear against the judicial function itself. The tax, therefore, violates intergovernmental tax immunity.

ARGUMENT AND CITATION OF AUTHORITY

A. The Petition Misstates The Holding Of The Court Of Appeals, So That Nothing Is Presented For Review.

While the District Court Opinion viewed the Jefferson County tax at issue as being levied upon gross receipts, the En Banc Eleventh Circuit Opinion sought to be reviewed specifically holds the following:

> The Alabama Supreme Court's determination of the operation of the Auburn ordinance is a reasonable interpretation of how the identical Jefferson County ordinance operates. Our examination of the Jefferson County ordinance, within the context of Alabama law, reveals that the privilege tax is a tax on the performance of work in Jefferson County. In substance, the privilege tax does not tax the receipt of income.
>
> The privilege tax differs fundamentally from an income tax. The ordinance purports to make it unlawful to engage in one's occupation in Jefferson County without paying the

privilege tax. Ordinance No. 1120, § 2. This provision indicates that, instead of taxing the receipt of income, the privilege tax attaches to the performance of work in Jefferson County.

Other provisions of the ordinance further demonstrate that the privilege tax does not merely tax the receipt of income. The privilege tax is levied not only on income received but also on income that one is entitled to receive, *id.* § 1(F), indicating that the ordinance is concerned with ensuring that work is taxed regardless of whether income from the work actually is received. Moreover, persons engaged in occupations or businesses for which they are required to pay state or other Jefferson County license fees are exempted from paying the privilege tax under Ordinance No. 1120. *Id.* § 1(B). We do not understand why, if the ordinance is an income tax, it exempts from its requirements persons paying license fees to Jefferson County or to the State of Alabama, license fees that are totally unrelated to income. This exemption makes sense only if the ordinance aims to ensure that a license fee is paid to some unit of government for all work performed in Jefferson County.

> We hold that the Jefferson County privilege tax is not, in substance, a tax on income. Though the privilege tax is measured by income, at least roughly, its other attributes remove it from any reasonable conception of an income tax. Therefore, this case is not controlled by *O'Keefe*'s holding that income taxes do not interfere with federal functions in violation of the intergovernmental tax immunity doctrine.

Jefferson County, Alabama, v. Acker, 92 F.3d 1561, 1570 [7] (11th Cir. 1996); emphasis added, footnote omitted. By contrast, the Petition now before this Court inaccurately contends that whether the tax is levied is on gross receipts, income or pay was undisputed fact in the Courts below. See Petition, pp. 3 (gross receipts), 5 (gross receipts), 10 n3 (linking "gross receipt" theory to income, thus to Public Salary Act), 17 and 17 n7 (linking "gross receipts" to Buck Act). Accordingly, the Petition now before this Court is based upon a misstatement of what the En Banc Opinion holds. The Petition is thus directed to an Opinion not written and presents nothing for the type of review contemplated by Rule 10(c) of this Court.

B. The Eleventh Circuit Correctly Held That The Jefferson County Tax Has Taxable Event As The Performance Of Compensable Services Within The County And Thus Is Levied Upon The Judicial Function As To Article III Judges, So That The Jefferson County Tax Violates Intergovernmental Tax Immunity, Based Upon Well Settled Authorities, So That No Disturbance In Precedent Is Presented.

1) Identification Of The Taxable Event Or Legal Incidence Of A State Statute Is First A Question Of Statutory Interpretation Under State Law.

In determining whether a tax imposed by a State offends intergovernmental immunity, the determination of the "taxable event" and the "legal incidence" of a tax imposed by an arm of State government is first a question of State law statutory interpretation of the State statute imposing the tax. *United States v. State Tax Commission of the State of Mississippi*, 421 U.S. 599, 95 S.Ct. 1872, 44 L.Ed.2d 404 (1975); *California Bd. of Equalization v. Chemehuevi Tribe*, 474 U. S. 9, 11 (1985); *Oklahoma Tax Commission v. Chickasaw Nation*, ___ U.S. ___, 115 S.Ct. 2214, 132 L.Ed. 2d 400 (1995). If, under the interpretation given such a State tax statute by State law rules of statutory construction, the legal incidence of the tax is made by the statute to fall on an

instrumentality or function of the federal government, then the tax offends intergovernmental tax immunity and must fall, regardless of any secondary argument which might be made as to who actually ends up paying the tax under an analysis of the practical effect of the tax. *United States v. State Tax Commission of the State of Mississippi*, 421 U.S. 599, 95 S.Ct. 1872, 44 L.Ed.2d 404 (1975). The secondary test of inquiry into the practical effect of a statute comes into play only if the legal incidence and taxable event as determined by State law are proper subjects for taxation. *Id.*, 421 U.S. 559. When, under the first test, the State law is found to rest upon a State's attempt to exercise power which it does not have, then there is nothing upon which the "practical effect" test can operate. *Id.*

Where State law, as interpreted by the State Court itself, shows that the tax is levied on a federal function, the inquiry ends short of any consideration of "practical effect." *United States v. State Tax Commission of the State of Mississippi*, 421 U.S. 599, 95 S.Ct. 1872, 44 L.Ed.2d 404 (1975). Here, the state law precedents and the face of the ordinance itself shows that the legal incidence of the tax, as applied to Article III judges, is upon the performance of the judicial function itself, so that the ordinance offends intergovernmental tax immunity of the judicial branch of government of the United States.

2) The United States Court of Appeals for the Eleventh Circuit Properly Found That, Under Applicable Precedent, The Taxable Event Under The Jefferson County Ordinance Was The Performance Of The Judicial Function Within Jefferson County.

In the case at bar, the United States Court of Appeals for the Eleventh Circuit properly and routinely applied Eleventh Circuit and United States Supreme Court precedent to determine the legal incidence and the taxable event described by the statute. In testing constitutionality of a State statute, the federal courts... do not sit to question [the state supreme court's] interpretation of that state's statutes * * * It is well-settled that "state courts have the right to construe their own statutes," *Bank of Heflin v. Miles*, 621 F.2d 108, 113 (5th Cir. 1980), and federal courts are bound by that state interpretation. *Id.* at 114. See also *Sanchez v. United States*, 696 F.2d 213, 216 (2d Cir. 1982) ("To comply with the principle of comity which undergirds our federal system, we are obliged to give full effect to decisions of New York's highest court on issues involving the application of New York

> law."). When ruling upon the constitutionality of a state statute, a federal court "may only consider the statute's plain meaning and authoritative state court constructions of the statute." *Florida Businessmen v. State of Florida*, 499 F. Supp. 346, 352 (N.D. Fla. 1980).

Cotton States Mut. Ins. Co. v. Anderson, 749 F.2d 663, at 667 (11th Cir. 1984).

> "A federal court applying state law is bound to adhere to decisions of the state's intermediate appellate courts absent some persuasive indication that the state's highest court would decide the issue otherwise." *Silverberg, v. Paine, Webber, Jackson & Curtis, Inc.*, 710 F.2d 678, 690 (11th Cir. 1983); *see Bradbury v. Wainwright*, 718 F.2d 1538, 1540 (11th Cir. 1983); *Flintkote Co. v. Dravo Corp.*, 678 F.2d 942, 945 (11th Cir. 1982). This is true, even if the federal court does not agree with that state court's reasoning or the outcome which the decision dictates. *Silverberg*, 710 F.2d at 690.

Provau v. State Farm Mut. Auto. Ins. Co., 772 F.2d 817, at 820 (11th Cir. 1985). Following these precedents, the Eleventh Circuit properly considered *McPheeter v. City of Auburn*, 288 Ala. 286, 259 So.2d 833 (1972) (interpreting a virtually identical occupational tax). Based upon *McPheeter* and based upon its own independent analysis of this Court's

precedents, the Eleventh Circuit Opinion here found that the taxable event described in the Jefferson County occupational tax was the performance of work within Jefferson County for which the taxpayer was entitled to be paid, whether payment would in fact eventually be forthcoming or not. *Jefferson County v. Acker*, 92 F.3d 1561, 1570-1571 (11th Cir. 1996).

To the same effect, the District Court had likewise concluded: "The tax here becomes effective even before the income is earned, and before it is paid, and before it is received." *Jefferson County v. Acker*, 850 F. Supp. 1536, at 1543-44, fn. 14 (N.D. Ala. 1994). That conclusion of law was never challenged by the appeal as made out by the appellant. Nor has that conclusion been challenged by the Petitioner in the Petition here. Instead, the Petition inappropriately seeks to avoid this pivotal conclusion of law by pretending it to be swept away by a claim of "undisputed fact."

This pivotal conclusion of law made by the both the United States District Court for the Northern District of Alabama and the United States Court of Appeals for the Eleventh Circuit, moreover, is manifestly correct under applicable Alabama law and under the language of the Ordinance itself.

The result reached by the District Court has direct support in that part of the language of *McPheeter* which construed an equivalent tax ordinance:

> Imposing payment of the tax or license fee on the individual so engaged and

> employed, places no tax burden on Auburn University, the State, or the federal government as such. The tax is not levied on the employer-employee relationship, but on the taxable event of rendering services or following a trade, business, or profession. The ordinance places the tax on an employee's privilege of working in the city limits of Auburn regardless of the person's employer or the place of residence of the employee.

McPheeter, 288 Ala. 286, 259 So.2d 833, 835. Here, the District Court's and the Eleventh Circuit's decision following *McPheeter* was also supported by the statutory and constitutional environment within which the tax ordinance was enacted. The Alabama Constitution forbids local legislation in areas occupied by general legislation. Alabama Const., Art. 4, § 105. It also provides for general legislation to provide for an income tax. Alabama Const., Amend. No. 25. The enabling legislation pursuant to which the Jefferson County tax ordinance was enacted provides for taxation by counties of the pursuit of vocations and occupations. 1967 Ala. Laws, No. 406. Thus, Jefferson County could not levy a true income tax under Alabama law.

Further, the Eleventh Circuit here went beyond the Alabama authorities and analyzed the effect of the language of the Ordinance itself. *Jefferson County v. Acker*, 92 F.3d 1561, 1570-1571 (11th Cir. 1996). The language of the tax ordinance itself shows that the tax is incurred when compensable work is performed and

there is an entitlement to compensation, regardless of whether compensation is ever in fact received:

> It shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession ... within [Jefferson] County on and after the 1st day of January, 1988, without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession, which license fees shall be measured by one-half percent (1/2%) of the gross receipts of each such person.

Jefferson County, Ala., Ordinance 1120, § 2; Petition App., p. 72.

> (F) The words "gross receipts" and "compensation" shall have the same meaning, and both words shall mean and include the total gross amount of all salaries, wages, commissions, bonuses or other money payment of any kind, or any other considerations having monetary value, which a person receives from or is entitled to receive from or be given credit for by his employer for any work done or personal services rendered in any vocation, occupation, calling or profession....

Ordinance 1120, § 1; emphasis added; Petition App., 71-72. Thus, a housepainter, or a federal judge, who

is entitled to be paid, suffers the tax on the gross amount to which he or she is entitled, regardless of whether payment is made. Hence, the plain language of the tax ordinance shows that it is levied on the value of the services rendered within the county, thus making it an occupational tax on compensable services at the time of their rendition. If it had any other effect -- if the taxable event were the receipt of compensation -- the fate under Alabama Const., Article IV, § 105 would be contrary to the result reached in *McPheeter*.

Based upon *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988) (interpreting the tax ordinance at issue) and *McPheeter v. City of Auburn*, 288 Ala. 286, 259 So.2d 833 (1972), the District Court correctly found the Alabama precedents to call for construction of the Ordinance at issue as being laid upon the rendition of compensable services -- here the function of the judiciary itself. *Jefferson County v. Acker*, 850 F. Supp. 1536, 1543-44 (N.D. Ala. 1994). That ruling of the District Court -- the determination of applicable state law precedent and statutory construction -- was never challenged in any way in the appeal as made out by the appellant's principal brief on appeal.

Under *Provau v. State Farm Mut. Auto. Ins. Co.*, 772 F.2d 817, at 820 (11th Cir. 1985), federal courts are required to follow State court construction of State law "even if the federal court does not agree with that state court's reasoning or the outcome which the decision dictates." *Id.*; emphasis added. The "practical effect" of the tax is not that of an income tax, as the Petitioner argues based upon the statute's wording that it is levied upon "gross receipts." Indeed, examination of the Ordinance reveals that if a federal

judge were to work and be entitled to compensation, a tax under the Ordinance would be incurred, without regard to whether compensation was ever received.

Jefferson County Ordinance 1120 presents this Court with a redefinition of the phrase "gross receipts" so severe as to put the meaning of that phrase in the Ordinance out of touch with the meaning of the same phrase as it occurs in statutes, case language, and other common use of English. In ordinary usage, the word receipt is defined as follows:

> rebceipt (rî-sêt‰) noun
> Abbr. rcpt., rec., rect.
> 1. a. The act of receiving: We are in receipt of your letter. b. The fact of being or having been received: They denied receipt of the shipment. 2. Often receipts. A quantity or amount received: cash receipts. 3. A written acknowledgment that a specified article, sum of money, or shipment of merchandise has been received. ....

American Heritage Dictionary. In Ordinance 1120, however, "gross receipts" refers to amounts which to which the taxpayer is entitled but has not received. Thus, case authorities which discuss taxes measured by "gross receipts" as that term is understood in ordinary English have no application to the so-called "gross receipt" measurement set forth in Jefferson County Ordinance 1120.

Current experience shows that there is a vast difference between "gross receipts" under the

Ordinance and "gross receipts" in ordinary English usage. Since 1981, there have been eight interruptions in federal funding. The last occurred while this case was before the Eleventh Circuit en banc. See "Budget Showdown Threatens Federal Shutdown," Atlanta Journal and Constitution, 9/4/95, p. A5. A suspension in funding could easily have resulted in the Judges in the case at bar performing work which entitled them to compensation one year, but which would have been received in the next year. Moreover, all Judges entitled to a refund of Social Security withholding under *Hatter v. U.S.*, 64 F.3d 647 (Fed.Cir. 1995), would be entitled to compensation in years past which will only be received at a future date. Thus, the taxable event under Ordinance 1120 may occur in one year and the receipt of compensation may occur in another. Clearly, the legal incidence of the tax is on the function performed and not the receipt of compensation.

When performance of the judicial function is underway, the Courts and the Judges are not distinct. In this, 28 USC § 132 provides: "Creation and composition of district courts .... (b) Each district court shall consist of the district judge or judges for the district in regular active service. Justices or judges designated or assigned shall be competent to sit as judges of the court." Thus, a judge is the Court when performing the judicial service. In the case at bar, the tax purports to be levied on the compensable rendition of services by the Article III judges while they are performing that function in Jefferson County. The tax does not fall upon them if they are engaged in any of the exempt professions outside the statute; nor does the

tax fall upon their receipt of compensation from investments or other sources. The tax is directed to what percentage of functions as District Court Judges occur within Jefferson County.

More than a monetary burden is presented. The Article III judges are employees of the United States under the Ordinance. The United States is the employer. The United States cannot, however, be compelled to prorate the compensation due for the employee's services within and without the County and make a return as required by the Ordinance. The Ordinance then throws those time-keeping and return requirements on the employees. The effect is to subject the Article III judges, at the time they are to be performing the judicial function, with the onerous record-keeping requirements of the Ordinance, so as to provide a basis for proration of activities inside and outside the County. A tax ordinance which requires Article III judges to maintain detailed time sheets to prorate according to where their functions are performed is an Ordinance which burdens the judicial function itself.

The burden reaches farther than the mere paperwork required. Under 28 USC § 1404(a), the venue of a civil action may be transferred in the interest of justice or for convenience.[1] Under the Jefferson County Ordinance, however, a transfer into Jefferson County from a Georgia District Court venue carries the inconvenience that a tax will be levied on the compensable services rendered by Georgia attorneys who may try the case and upon the services

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[1] See also Fed.R.Crim.Proc. 21(a), 18 U.S.C.

of the judge trying the case -- to the extent that those services are rendered within the County. Thus, with the intrusion of inflicting additional paperwork into the judicial function comes the additional intrusion upon the decision-making process itself. The Eleventh Circuit properly considered the degree of intrusion presented and properly found the judicial function itself to be burdened by the particular requirements of the privilege tax presented. *Jefferson County v. Acker*, 92 F.3d 1561, 1570-1571 (11th Cir. 1996).

As the District Court properly found, Congress would not be not competent to waive the immunity of the judiciary from such intrusion. But that holding is not Eleventh Circuit precedent, for that part of the District Court Opinion has been superseded by the Eleventh Circuit En Banc Opinion, holding that Congress has done nothing which could be construed to have done such a thing.

CONCLUSION

Accordingly, the Eleventh Circuit Opinion presents no disturbance of precedent and no general immunity from income taxes as urged in the unrestrained hyperbole upon which the Petition is based. While the constitutional principles involved are of great importance, there is nothing novel about their application or development. What is presented is simply a tax under which the local governing authority sought to use the term "gross receipts" to fit federal case law and then defined the term in such a peculiar way so that the tax was not on anything gross and not on anything received. Unless federal authorities are in

need of a restatement of the rule that there is no magic in mere nomenclature, no reason appears to grant certiorari. The Petition should be denied.

Respectfully submitted,
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APPENDIX OF RESPONDENT JUDGES

WILLIAM M. ACKER, JR. AND U. W. CLEMON
JEFFERSON COUNTY, A political sub-division of the State of Alabama,
Plaintiff-Appellant,
v.
William W. ACKER, Jr.,
Defendant-Appellee.

JEFFERSON COUNTY, A political sub-division of the State of Alabama,
Plaintiff-Appellant,
v.
U.W. CLEMON,
Defendant-Appellee.

No. 94-6400.
United States Court of Appeals,
Eleventh Circuit.

Jan. 12, 1996.

Edwin A. Strickland, Jeffrey M. Sewell, Charles S. Wagner, Birmingham, AL, for appellant.

Irwin W. Stolz, Jr., Seaton D. Purdom, Gambrell & Stolz, Atlanta, GA, for Acker & Clemon.

Kevin M. Forde, Richard J. Pendergast, Chicago, IL, for Federal Judges Association (amicus).

Appeal from the United States District Court for the Northern District of Alabama (Nos. CV-93-M-69-5 and CV-93-M-196-5), Charles A. Moye, Jr., Judge.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion August 21, 1995, 11th

Cir., 1995, 61 F.3d 848)

Before TJOFLAT, Chief Judge, and KRAVITCH, HATCHETT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES and BARKETT, Circuit Judges. [FN*]

FN* Senior U.S. Circuit Judge Albert J. Henderson has elected to participate in further proceedings in this matter pursuant to 28 U.S.C. § 46(c).

BY THE COURT:

A member of this court in active service having requested a poll on the suggestion for rehearing en banc and a majority of the judges in this court in active service having voted in favor of granting a rehearing en banc, IT IS ORDERED that the above cause shall be reheard by this court en banc. The previous panel's opinion is hereby VACATED.

CONSTITUTION OF ALABAMA OF 1901
ARTICLE IV LEGISLATIVE DEPARTMENT

§ 105 Special laws; prohibited when general laws applicable.

No special, private, or local law, except a law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law, or when the relief sought can be given by any court of this state; and the courts, and not the legislature, shall judge as to whether the matter of said law is provided for by a general law, and as to whether the relief sought can be given by any court; nor shall the legislature indirectly enact any such special, private, or local law by the partial repeal of a general law.

AL CONST Art. 4, § 105

CONSTITUTION OF ALABAMA OF 1901
AMENDMENTS
Amend. No. 25. Article XXII; Income Tax

Article XXII. The legislature shall have the power to levy and collect taxes for state purposes on net incomes from whatever source derived within this state, including the incomes derived from salaries, fees and compensation paid from the state, county, municipality, and any agency or creature thereof, for the calendar year, 1933, and thereafter and to designate and define the incomes to be taxed and to fix the rates of taxes, provided that the rate shall not exceed 5 percent nor 3 percent on corporations. Income shall not be deemed property for purposes of ad valorem taxes. From net income an exemption of not less than fifteen hundred dollars ($1,500.00) shall be allowed to unmarried persons and an exemption of not less than three thousand dollars ($3,000.00) shall be allowed to the head of a family, provided that only one exemption shall be allowed to husband and wife where they are living together and make separate returns for income tax. An exemption of not less than three hundred dollars ($300.00) shall be allowed for each dependent member of the family of an income tax payer under the age of 18 years. The legislature shall reduce the ad valorem tax from time to time when and to such an amount as the revenue derived from the income tax will justify. In the event the legislature levies an income tax, such tax must be levied upon the salaries, income, fees, or other compensation of state, county and municipal officers and employees, on the same basis as such income taxes are levied upon other persons. All income derived from such tax shall be held in trust for the payment of the floating debt of

Alabama until all debts due on Oct. 1st, 1932, are paid and thereafter used exclusively for the reduction of state ad valorem taxes.

AL CONST AMEND. No. 25

U.S. Const., Art. III, § 1
[Judicial Power, Tenure of Office]

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

28 U.S.C. § 132.
Creation and composition of district courts

(a) There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district.
(b) Each district court shall consist of the district judge or judges for the district in regular active service. Justices or judges designated or assigned shall be competent to sit as judges of the court.
(c) Except as otherwise provided by law, or rule or order of court, the judicial power of a district court with respect to any action, suit or proceeding may be exercised by a single judge, who may preside alone and hold a regular or special session of court at the same time other sessions are held by other judges.

28 U.S.C. § 1404.
Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

(d) As used in this section, "district court" includes the United States District Court for the District of the Canal Zone; and "district" includes the territorial jurisdiction of that court.

Fed.R.Crim.Proc. 21(a), 18 U.S.C.

The court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.